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No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court below (R. 17–25) is not yet officially reported.

JURISDICTION

The judgment sought to be reviewed was entered December 3, 1928. (R. 25, 26.) Motion for a new trial was overruled March 11, 1929. (R. 26.) Petition for writ of certiorari was filed June 4, 1929. (R. 26.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Whether petitioner established in the court below that the electric storage batteries manufactured and sold by petitioner were not "parts or accessories for" automobile trucks, automobile wagons, other automobiles or motor cycles within the meaning of Section 900(3) of the Revenue Acts of 1918 and 1921, and of the Regulations of the Commissioner of Internal Revenue made by authority of said Acts, so as not to be taxable thereunder.

STATUTES INVOLVED

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, as far as applicable:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles numerated in subdivision (1) or (2), sold to any person other

than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum; * * *.

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, in substance follows Section 900 of the Act of 1918.

REGULATIONS OF THE COMMISSIONER OF INTERNAL REVENUE

Article 14 of Regulations Number 47 (revised December, 1920), promulgated by the Commissioner and approved by the Secretary of the Treasury, is in part as follows:

Tires, inner tubes, parts, and accessories sold to manufacturers.—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials, and are exempt from tax.

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or

producer, is subject to tax as a "part or accessory." * * *

Article 15 is in part as follows:

Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators, etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor," are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicle.

Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of

manufacture that they are primarily adapted for use as a component part. * * *

Article 16 contains the following provisions:

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

The term "accessories" includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the complete kit.

A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable.

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

Robes, goggles, and lunch kits are not subject to tax. Asbestos brake band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. * * *

STATEMENT

The petitioner sued in the Court of Claims to recover excise taxes in the sum of $27,841.35, plus interest and penalties, assessed against it with respect to completed storage batteries manufactured and sold by it to persons other than manufacturers of automobiles and motor cycles during the period extending from March, 1919, to September, 1923. (R. 13, 18–21.) The petitioner had filed with the Commissioner of Internal Revenue a claim for re-

fund of the taxes in question. The Commissioner granted a refund on account of battery parts sold separately, but rejected the claim on account of completed storage batteries. (R. 24, 25.) The Court of Claims entered judgment for the United States sustaining the tax. (R. 25.)

Its findings show that petitioner is a corporation organized and engaged in business under the laws of the State of Illinois, its business being the manufacture and sale of storage batteries and storage-battery parts. (R. 17.) The function of a storage battery in an internal-combustion engine is to produce a spark to set the mixture afire. In an automobile propelled by an internal-combustion engine the battery may also furnish current to light the car and start the engine. (R. 22.) For the past twenty years storage batteries such as were manufactured by the petitioner have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm lighting plants, aeroplanes, and for propelling mining cars and small baggage trucks, in summer camp lighting equipment, and for operating door bells, railway switches, wireless telegraph, radio, telephone, telegraph, fire alarm and electroplating apparatus. The petitioner sold its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and had no means of knowing at the time of sale for what purpose its batteries would be used. (R. 23.) Automobile manufacturers as a rule equip their cars with standard batteries. Petitioner man-

ufactured several types of batteries. Any one of them could be used in some automobile. The different types have order numbers. No battery was made to fit any particular automobile unless specially ordered. (R. 24.)

ARGUMENT

The court below decided this case without opinion on the sole authority of *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164 (certiorari denied, 278 U. S. 641). (R. 25.)

As the two cases deal with the same identical subject matter, namely, excise taxes on storage batteries collected under authority of the same statute and section, the court's conclusion of law sustaining the tax obviously rests upon the basis that the material facts in the two cases are similar.

The case of *Vesta Battery Corporation* v. *United States*, now pending in this Court on petition for writ of certiorari (No. 275) was decided by the Court of Claims against the plaintiff in the same manner as the instant case on the sole authority of *Cole Storage Battery Company* v. *United States* (No. 275, R. 28). The findings of fact in the *Vesta Battery Corporation case* are similar in all material respects to those of the *Cole Storage Battery case*, cited by the court. It is a reasonable inference that the court below was satisfied that there was such a similarity of facts between the instant case and the *Cole Battery case* as to justify the application of the latter as the one decisive

authority in the instant case. Indeed, the analogy of the two cases must have been as clear in the court's mind as if there were before it a stipulation of counsel that the testimony taken in the *Cole case* should be considered as a portion of the testimony in this case.

In the instant case, however, the findings are meager and neutral compared with those in the *Cole Battery* and the *Vesta Battery cases*. On many salient points the findings are silent. Petitioner's brief (pp. 19–20) adroitly takes advantage of these lacunae in the findings to distinguish this case from the *Cole Battery case*. It is embarrassing to the respondent not to be able to refer to findings, which if complete would, it is believed, not leave the slightest doubt that *Cole Battery Company* v. *United States* was an apt and controlling citation, and that the decision of the lower court in the instant case was sound and right. However, the special findings do show affirmatively that the petitioner sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors; that automobile manufacturers as a rule equip their cars with standard batteries (Finding IX); that petitioner manufactures several types of batteries; that any one of them could be used in some automobile; that the different types have order numbers (Finding X).

The mere absence in the special findings in the instant case of what petitioner calls "the determinative facts" in the special findings in the *Cole Battery case* does not establish the petitioner's cause of

action against the United States. The burden was on the petitioner to prove in the Court of Claims the facts establishing the invalidity of the tax. *United States* v. *Anderson,* 269 U. S. 422, 443. There is not a single affirmative finding of fact of the court below inconsistent with the taxability of the sales made by petitioner. Apparently sensing this lack, and in an effort to cover it, petitioner's brief (p. 3) concludes a summary of the court's findings with this sentence:

> It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

Assuming, without conceding, that this inference of counsel is correct, we submit that this mere negative inference does not sustain the burden of proof which was on the plaintiff. *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 290.

That "parts" and "accessories for" automobiles are correctly defined in Articles 14, 15, and 16 of the Regulations of the Commissioner of Internal Revenue (*supra,* pp. 3–6) is not disputed. It is evident that the Commissioner, as shown by his Regulations, did not assume any right to tax storage batteries as such. So the petitioner's case is that its storage batteries do not come within the terms of the definition of "parts" or "accessories for" automobiles and that, applying the legal criteria to the facts as alleged, no tax is assessable. (R. 10, 11.)

The legal criteria are unchallenged; only questions of fact remain to be determined.

The decision which this Court is asked to review was specifically based upon the decision of *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164, certiorari denied, 278 U. S. 641. In the opinion in the *Cole case*, the Court of Claims said (65 C. Cls., at p. 170):

> We hardly think it essential to enter upon a scientific résumé of the origin and detail construction of storage batteries and manner of functioning. It is not denied, and obviously is incapable of disputation, that an automobile so far as locomotion is concerned, if operated by a gasoline engine, would be a more than useless device without a storage battery. This case in our opinion turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various

> elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue. The commissioner is careful not to tax storage batteries as such, and adopts a method of procedure which reaches only those as described in the findings.

Manifestly the Court of Claims must have been satisfied that the facts in the instant case justified the application of the *Cole case* as an authority.

CONCLUSION

No new or important question of general law is presented by this case. This Court has in three recent instances denied certiorari where the same statute and section were involved. (*Walker Manufacturing Company* v. *United States*, 65 C. Cls. 394, 278 U. S. 617; *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164, 278 U. S. 641; *Advance Automobile Accessories Corporation* v. *United States*, decided by Court of Claims October 22, 1928, but not yet reported, certiorari denied May 13, 1929.) The tax on automobile accessories was

repealed in 1926. We submit that the judgment below was correct, and the petition for writ of certiorari should be denied.

Respectfully submitted.

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